

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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77-1439

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA :

- v - :

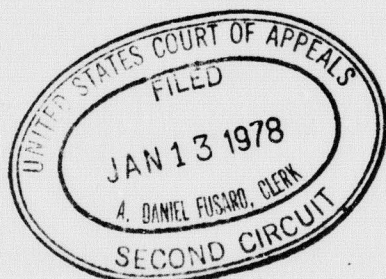
JAMES FIGUEROA :
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Docket No. 77 CR. 500

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P/S

Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT



MARK T. SHEHAN
ATTORNEY FOR APPELLANT
919 Third Avenue
New York, New York
(212) 371-6000

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UNITED STATES COURT OF APPEALS
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- - - - -x
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-v- : 77 CR. 500
JAMES FIGUEROA :
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BRIEF FOR APPELLANT JAMES FIGUEROA

PRELIMINARY STATEMENT

Appellant James Figueroa ("Figueroa") plead guilty to six counts of bank robbery and attempted bank robbery in the United States District Court for the Southern District of New York on July 12, 1977. On August 29, 1977 Hon. Milton Pollack sentenced Figueroa to fifteen years imprisonment.

The appellant appeals the sentence imposed by Judge Pollack. In imposing such sentence Judge Pollack relied on erroneous facts regarding the appellant's prior criminal record and the offenses charged against him and failed to take into consideration Figueroa's offer of cooperation to federal authorities and Figueroa's ability and determination for rehabilitation. Such erroneous reliance and disregard for the appellant's potential

for rehabilitation was invalid and demands a reconsideration of the sentence imposed.

STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW

Was Figueroa invalidly sentenced in the court below by reason of:

(a) the judge's reliance in imposing sentence on a prior arrest for a violent crime which never resulted in even an indictment of the defendant;

(b) the judge's reliance in imposing sentence on the statements of a witness who alleged that the defendant had threatened her with a handgun during a bank robbery and the judge's failure to afford the defendant an opportunity to prove the non-existence of such a weapon;

(c) the judge's failure to take into account the defendant's offer to cooperate with the Federal Bureau of Investigation and United States Attorney's office in apprehending and convicting another person involved in the offenses to which the defendant plead guilty; and

(d) the judge's total lack of investigation into and utter disregard for the ability and determination of the defendant for rehabilitation?

STATEMENT OF THE CASE

A. Nature of the Case

This case involves the facts and circumstances under which the appellant Figueroa was sentenced.

B. The Course of Prior Proceedings

On July 1, 1977 an eleven-count indictment was filed in the United States District Court for the Southern District of New York charging Figueroa with bank robbery in counts one through nine and attempted bank robbery in counts ten and eleven in violation of Title 18, United States Code, Section 2113(a). The defendant plead not guilty to the offences charged in the indictment on July 7, 1977. On July 12, 1977, the appellant changed his plea to guilty as to counts one, seven, eight, nine, ten and eleven. On August 29, 1977 Judge Milton Pollack sentenced the appellant to imprisonment for a period of fifteen years on each of counts one, seven, eight, nine, ten and eleven to run concurrently with each other and on the government's motion dismissed the remaining counts. On August 31, 1977 the appellant applied for a court order permitting him to

be married while at Metropolitan Correction Center and was subsequently married.

C. The Facts Relating to the Sentencing of Figueroa

On August 29, 1977. Figueroa appeared before Judge Pollack for sentencing. c. Figueroa's counsel at that time, Robert Marrow, Esq., made an extensive statement to the court emphasizing that the crimes the appellant had committed did not involve great amounts of money or violent acts (Transcript, 8/29/77, p. 3, 7-8). In addition, Mr. Marrow emphasized to the court that the appellant needed and wanted rehabilitation (Transcript, 8/29/77, p. 8-16) and that drugs had been the root of his problem (Transcript, 8/29/77, p. 8-9). Mr. Marrow also pointed out that Figueroa, on his own, had freed himself of any drug dependence while in prison, having asked to be taken off of even methadone (Transcript, 8/29/77, p. 6) and that the defendant sincerely desired rehabilitation so that he could leave prison and lead a normal life with the woman who he subsequently married after sentencing (Transcript, 8/29/77, p. 8).

Mr. Marrow also brought to the Court's attention the fact that Figueroa had offered to the United States Attorney's office his cooperation with respect to aiding the Federal Bureau of Investigation and the United States Attorney's office in apprehending and convicting another person involved in the same bank robberies for which

Figueroa had been arrested. (Transcript, 8/29/77, p. 5-6) Because of the defendant's desire for rehabilitation and his belief in the defendant's ability to rehabilitate himself, Mr. Marrow asked that Figueroa be treated under the Youth Corrections Act, Title 18, Section 4216, and be sent to a study program pursuant to Section 5010(e) of Title 18 (Transcript, 8/29/77, p. 16).

Figueroa also made a lengthy statement to the court, pleading that the court have "mercy and consideration" stating "there was no intent in my heart to hurt anyone. All I was doing was trying to get the money so I could support my habit and live." (Transcript, 8/29/77, p. 19). In addition, Figueroa asked the court to take into account the fact that he now believed he had something to live for - the woman he subsequently married and her son (Transcript, 8/29/77, p. 18-19) and that with her help he could rehabilitate himself (Transcript, 8/29/77, p. 19).

Judge Pollack, before imposing a fifteen year sentence, reviewed the offenses to which the appellant had plead guilty and the appellant's background. (Transcript, 8/29/77, p. 20-25.) Contrary to the statements made earlier by Figueroa's counsel that Figueroa did not have a gun or threaten any bank teller with a gun (Transcript, 8/29/77, p. 7), which was the same conclusion reached by the probation officer in the presentence report (Transcript,

8/29/77, p. 7-8), Judge Pollack just before sentencing Figueroa, read into the record a bank teller's statement that the appellant had allegedly pointed a handgun at her. (Transcript, 8/29/77, p. 21) In addition, Judge Pollack quoted the same bank teller as saying that the appellant had threatened to shoot her unless she gave him money. (Transcript, 8/29/77, p. 21.)

Judge Pollack also reviewed the past criminal record of the appellant. During this review he pointed out that Figueroa had been arrested for murder, assault and possession of a dangerous weapon and had stabbed a female complainant in the stomach, even though the defendant was never indicted. (Transcript, 8/29/77, p. 24) Having completed his review of Figueroa's record, Judge Pollack stated:

"A very illuminating record.

"There is very little doubt in the mind of the Court that these prior statements charging, in effect, society with his problems don't comport with what the record shows. There is no indication that this defendant has the ability or the determination to improve his situation." (Transcript, 8/29/77, p. 25-26)

Judge Pollack then sentenced Figueroa to a term of fifteen years imprisonment.

ARGUMENT

THE FACTS RELIED ON BY THE
JUDGE BELOW AND THE JUDGE'S
FAILURE TO TAKE INTO ACCOUNT
CERTAIN FACTS RENDERED THE
SENTENCING PROCEDURE INVALID.

When unfairness in imposing a sentence has occurred, the Supreme Court has ruled that resentencing of the defendant is mandated in order to guarantee that the defendant has been afforded due process of law. United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948). Applying this mandate from the Supreme Court, this Circuit has consistently held that where there is a possibility that a sentence was imposed on the basis of false information or false assumptions concerning the defendant, the sentence imposed by the District Court will be vacated on appeal. United States v. Robin, 545 F.2d 775 (2d Cir. 1976); United States v. Stein, 544 F.2d 96 (2d Cir. 1976); United States v. Herndon, 525 F.2d 208 (2d Cir. 1975); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970). The rule in this Circuit was stated by the Court in United States v. Malcolm, supra:

"Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders

the entire sentencing procedure invalid as a violation of due process. Townsend v. Burke, supra, 334 U.S. at 740-741." 432 F.2d at 816.

The record in this case leaves no doubt that in sentencing Figueroa the judge below was influenced by an erroneous consideration of information regarding Figueroa's criminal record. In the judge's review of Figueroa's past criminal record, Figueroa's arrest for a crime for which he was never indicted stands out prominently. The effect of a court's consideration of such information is well illustrated in Townsend v. Burke, supra. There the Supreme Court, in reviewing a trial court's consideration of an arrest and two other charges for which the defendant was found not guilty, stated:

"The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving." 334 U.S. at 740 (emphasis added).

Likewise, in United States v. Tucker, 404 U.S. 443 (1972),

the Supreme Court found that the sentence imposed by a federal district court judge must be reconsidered when the judge, in imposing sentence, gave explicit consideration to the defendant's previous convictions and later it was determined that two of the previous convictions were constitutionally invalid.

This Circuit has also realized that a sentence based upon false assumptions as to prior convictions violates due process of law. In United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970), where a trial judge had been influenced by misunderstanding as to the defendant's prior criminal record, this Court found that the fifteen-year sentence imposed for bank robbery required a remand for resentencing. The Court stated:

"There can be no question that the garbled criminal record was the dominant factor influencing sentence. We cannot say that the sentencing judge would have given as heavy weight to the true history as he did to his distorted version. Thus, the judge's heavy emphasis, itself, intensifies the significance of his confusion. In that sense, therefore, Malcolm was prejudiced for he was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. A sentence predicated on such a misreading of the record, especially when imposed in a context of other aggravating circumstances, violates due process." 432 F.2d at 816 (emphasis added).

Thus, it is clear that the trial judge's consideration of the arrest for which Figueroa was never indicted alone is enough to warrant remand.

In addition, however, in the case at hand, besides the judge's error in considering Figueroa's arrest for which no indictment was returned, other erroneous factors were considered. The record demonstrates that the judge below believed that Figueroa had used a handgun to threaten a bank teller during a robbery, even though the pre-sentence report showed this not to be so and Figueroa's counsel had pointed out this fact to the judge. That the judge relied on this false report and considered it material is demonstrated by the fact that just before imposing sentence, he read into the record the bank teller's statement that the defendant had threatened her with a hand gun. As this Court in United States v. Stein, 544 F.2d 96 (2d Cir. 1976), stated, such inclusion warrants the conclusion that the judge considered the information material:

"Furthermore, the fact that the trial judge expressly referred to these matters upon imposition of sentence indicates that she probably considered them to be material; otherwise there would not have been any point in her mentioning them." 544 F.2d at 102.

Moreover, the statement regarding the handgun by the judge, demonstrating his belief that it had been used by Figueroa, occurred after Figueroa's counsel had addressed the court and after Figueroa himself had asked for leniency by the court.

The disclosure of a judge's belief in materially false information after counsel's and defendant's statements have been heard, thereby affording no opportunity for explanation or refutation, is clearly erroneous. United States v. Powell, 487 F.2d 325 (4th Cir. 1973). In Powell, the judge, just before sentencing the defendant, took into consideration information which had no basis in fact -- that the defendant had been the ringleader of an auto theft group -- and had denied the defendant an opportunity to refute this assumption. The court found this to be error, just as this Court should find the judge's assumption regarding Figueroa's use of the handgun to be error when no opportunity was given to refute the erroneous assumption, stating:

"The district judge did not disclose that he believed Powell was the ringleader and the cause of his brother's involvement until after Powell's counsel had addressed the court and Powell had exercised his right of allocution. Immediately after the disclosure, without reopening the proceedings for further argument or explanation, the court pronounced sentence. Thus, Powell was denied the opportunity to explain or refute the charge before he was sentenced. These two defects in the sentencing procedure-- failure of the record to support material factors on which the severity of the punishment rested, and Powell's lack of an opportunity to explain or refute the derogatory information on which the judge relied

--denied Powell due process of law. Cf. Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L.Ed. 1690 (1948); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970)." 487 F.2d at 389 (emphasis added).

In addition to the error committed by the judge below in relying on certain false assumptions in imposing sentence, the judge also erred in failing to consider certain facts regarding Figueroa. As the record indicates, Figueroa had offered to cooperate with the United States Attorney's office and aid the Federal Bureau of Investigation and the United States Attorney's office in apprehending and convicting another person involved in the bank robberies that Figueroa had participated in. Nowhere in the record does it appear that the judge took this factor into consideration in imposing sentence. Such cooperation in the investigation and prosecution of another criminal is clearly an important factor that should be considered by a judge in imposing sentence. United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970). As this Court in Malcolm stated:

"There can be no question that a defendant's cooperation in the investigation and prosecution of the murder of a policeman and other serious crimes is highly material to mitigation of punishment not only because the defendant should be rewarded for his services to the community but also because cooperation with law enforcement authorities is a significant step toward rehabilitation. Clearly, therefore, Malcolm had a right to

present all available information bearing on his cooperation with the authorities fully and accurately, and, correlatively, the court had a duty to listen and to give such information serious consideration." 432 F.2d at 817.

Finally, it is clear from the remarks of the judge below that, in addition to basing the sentence on false information and ignoring the offer by Figueroa to cooperate with federal authorities, the judge totally disregarded Figuerca's statements as to his determination to rehabilitate himself. While a judge may be free to believe or disbelieve the statements of a defendant, the judge's total disregard of a defendant's statements, coupled with his reliance on materially false information, demands that the sentence imposed be re-examined. As this Court in United States v. Malcolm, supra, stated:

"The judge, therefore, is required to listen and to give serious consideration to any information material to mitigation of punishment. We cannot say that if the judge had acted on the basis of complete and accurate information, verified by the prosecutor, it would have had no mitigating impact on the sentence. This is so although the judge, in his discretion, is not required to lighten the penalty even if there are mitigating circumstances." 432 F.2d at 819.

CONCLUSION

The sentence imposed by the District Court should be vacated and remanded with directions to consider on resentencing the true extent of Figueroa's criminal record, the correct facts concerning the offenses committed by Figueroa, the fact of Figueroa's offer of cooperation with federal authorities and Figueroa's ability and determination for rehabilitation.

Dated: New York, New York
January 13, 1978

Respectfully submitted,

Mark T. Shehan
Attorney for Appellant
919 Third Avenue
New York, New York 10022
(212) 371-6000

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JAN 13 1978

U. S. ATTORNEY
SO. DIST. OF N.Y.

